

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PESTEX, INC.,	§
	§ No. 3, 2005
Appellee Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
	§ in and for Sussex County
JOHN SABO,	§ C.A. No. 03A-11-001
	§
Appellant Below-	§
Appellee.	§

Submitted: February 7, 2005

Decided: February 23, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

**ORDER**

This 23rd day of February 2005, upon consideration of the appellee's motion to dismiss, and the response and reply thereto, it appears to the Court that:

(1) The appellant, Pestex, Inc., filed this appeal from a decision of the Superior Court, dated December 7, 2004, which reversed a decision of the Industrial Accident Board terminating appellee John Sabo's total disability benefits in favor of partial disability benefits. The Superior Court's December 7, 2004 order specifically did *not* remand the case for further proceedings before the Board. On December 23, 2004, Sabo filed a

motion requesting the Superior Court to award him attorney's fees. That application remains pending before the Superior Court.

(2) Sabo has filed a motion to dismiss this appeal on the ground that the Superior Court's December 7, 2004 order is interlocutory and that Pestex has not complied with Supreme Court Rule 42, which governs appeals from interlocutory orders. Sabo contends that the Superior Court's order is not final and appealable until it rules on Sabo's request for attorneys fees. Pestex, on the other hand, contends that the appeal is not interlocutory because the Superior Court's December 7, 2004 order did not mention an award of attorneys fees; therefore, according to Pestex, it was required to file its notice of appeal within 30 days of the December 7, 2004 order.

(3) Upon consideration of the parties' respective positions, we conclude that this appeal is interlocutory. This Court consistently has held that a judgment on the merits is not final until an outstanding related application for an award of attorney's fees has been decided.<sup>1</sup> The ruling from which the appeal is taken is interlocutory in nature because it did not finally determine and terminate the cause before the Superior Court.<sup>2</sup> Furthermore, Pestex failed to comply with either the requirements of

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<sup>1</sup> *Lipson v. Lipson*, 799 A.2d 345, 348 (Del. 2001).

<sup>2</sup> *See Julian v. State*, 440 A.2d 990 (Del. 1982).

Supreme Court Rule 42 in seeking to appeal from an interlocutory order or with the requirements of Superior Court Civil Rule 54(b) in requesting entry of judgment on the December 7, 2004 order.

NOW, THEREFORE, IT IS ORDERED that Sabo's motion to dismiss is GRANTED. Pestex's filing fee paid in conjunction with this appeal shall be transferred to any later appeal from a final judgment entered by the Superior Court in this matter. This appeal is hereby DISMISSED.

BY THE COURT:

/s/ Randy J. Holland  
Justice